IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 50 OF 2004

MR.JONNATHAN PEREIRA AND ANR., ...Appellants

Versus

MR.AGNELO J.MONTEIRO,CARANZALEM-GOA. ....Respondents

Mr. A. F. Diniz, advocate for the appellants.
Mr. D. Pangam, advocate for the respondents.

Coram:- R. M. LODHA, J.

Date:- 17th August, 2005

P.C.

Heard Mr. Diniz, learned counsel for the appellants. The appellants are the original defendants. They made the application thus:-

"1. It is the case of the plaintiff that the defendants has (have) to pay to the plaintiff an amount of Rs.l,65,200/- for extra work and extra area and therefore the plaintiff is holding the possession of the second floor flat.

2. The defendants have filed the written statement denying the same.

3. The defendants, without prejudice to their case, state that they are ready and willing to deposit an amount of Rs.l,65,200/- before this Hon'ble Court as security for releasing the said second floor flat.

4. The defendants state that besides the suit premises they have no other accomodation for residence in Goa.

It is therefore prayed that an order be passed allowing the defendants to deposit an amount of Rs.l,65,200/- as security deposit before this Hon'ble Court and the plaintiff be directed to release the vacant and peaceful possession of the second floor flat to the defendants."

The aforesaid application has been rejected by the learned trial Court giving rise to the present Appeal From Order.

I wanted to know from the learned counsel for the appellants as to how the appeal was maintainable based on order passed in the application. The learned counsel for the appellants submitted that the application made by the appellants/defendants was under Order 39 of the Code of Civil Procedure and the order passed thereon is appealable under Order 43 Rule 1 (r) of the Code of Civil Procedure.

I find it difficult to accept the submission of the learned counsel for the appellants. The application that has been noticed above and the relief made therein is not covered by Order 39 of the Code of Civil Procedure and, at best, can be said to be an application made under Section 151 of the Code of Civil Procedure. On this basis the impugned Order is not amenable to the appellate jurisdiction and this Appeal From Order is not maintainable.

Even if it is assumed that the application made by the defendants was covered by Order 39 of the Code of Civil Procedure and the appeal is maintainable, then also the rejection thereof by the learned trial Judge cannot be faulted with. It is not in dispute that the dues of the plaintiff remain outstanding even as on date. That being the position, surely the defendants were not entitled to get possession of the second floor flat during the pendency of the suit.

Appeal From Order does not call for any interference. Dismissed in limine.

R. M. LODHA, J.